INDEX

	Page
Opinions below	1
Jurisdiction	1
Statement	2
The question certified	3
The statute involved	4
Argument:	
Construction of the statute	4
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Bledsoe v. *State*, 130 Ark. 122	5
People v. *Herlihy*, 72 N. Y. Sup. p. 289	8
State v. *Case*, 53 Mo. 246	10
State v. *Darling*, 89 Me. 400	5
State v. *Gluck*, 49 Kans. 533	5
State v. *Williams*, 109 Ark. 465	5
United States v. *Eaton*, 144 U. S. 677	10
United States v. *Reese*, 92 U. S. 214	13
Statutes:	
Act of July 18, 1866, Secs. 7 and 42, c. 201, 14 Stat. 178, 179, 188	6
Act of July 20, 1868, Sec. 98, c. 186, 15 Stat. 125, 165	7
Act of March 3, 1873, c. 244, 17 Stat. 580	6
Act of February 8, 1875, Sec. 23, c. 36, 18 Stat. 307, 312 (U S. C., Title 26, Sec. 68)	7, 16
Act of March 2, 1893, c. 196, 27 Stat. 531, 532, as amended by the act of April 1, 1896, Sec. 6, c. 87, 29 Stat. 85 (U. S. C., Title 45, Sec. 6)	10
Act of June 14, 1906, Sec. 4, c. 3299, 34 Stat. 263, 264 (U. S. C., Title 48, Sec. 246)	10
Act of May 30, 1908, Sec. 3, c. 225, 35 Stat. 476 (U. S. C., Title 45, Sec. 18)	10
Act of July 2, 1909, Sec. 22, c. 2, 36 Stat. 1, 8	7
Act of April 26, 1910, Sec. 4, c. 191, 36 Stat. 331, 332 (U. S. C., Title 7, Sec. 128)	10
Act of February 17, 1911, Sec. 9, c. 103, 36 Stat. 913, 916 (U. S. C., Title 45, Sec. 34)	11
Act of March 3, 1917, Sec. 21, c. 165, 39 Stat. 1123, 1129	16

Statutes—Continued.	Page
Act of March 3, 1919, Sec. 22, c. 97, 40 Stat. 1291, 1299 (U. S. C., Title 13, Sec. 44)	7
Alaska Game Commission Act, Sec. 15, c. 75, 43 Stat. 739, 747 (U. S. C., Title 48, Sec. 202)	7
Alaska Game Law, Sec. 5, c. 162, 35 Stat. 102, 104	7
National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305)—	
Title I—	
Sec. 2	13
Title II—	
Sec. 2 (U. S. C., Title 27, Sec. 11)	4
Sec. 5 (id., Sec. 14)	11
Sec. 7 (id., Sec. 17)	8
Sec. 8 (id., Sec. 19)	11
Sec. 9 (id., Sec. 21)	11
Sec. 10 (id., Sec. 22)	11
Sec. 12 (id., Sec. 24)	8
Sec. 13 (id., Sec. 25)	9
Sec. 26 (id., Sec. 40)	11
Sec. 29 (id., Sec. 46)	4, 11
Penal Code, Sec. 101 (U. S. C., Title 18, Sec. 188)	6
Revenue Acts—	
1918 Sec. 1317, c. 18, 40 Stat. 1057, 1146	6
1921, Sec. 1311, c. 136, 42 Stat. 227, 311	6
1924, Sec. 1018, c. 234, 43 Stat. 253, 344	6
1926, Sec. 1115, c. 27, 44 Stat. 9, 117; U. S. C., App., Title 26, Sec. 26	6, 15
Revised Statutes—	
Sec. 1780 (U. S. C., Title 18, Sec. 188)	6
Sec. 3084 (U. S. C., Title 19, Sec. 510)	6
Sec. 3164 (U. S. C., Title 26, Sec. 26)	6
Sec. 3169 (id., Sec. 64)	7
Tariff Act of 1922, c. 356, 42 Stat. 858, 984, 989:	
Sec. 603; U. S. C., Title 19, Sec. 510	6, 15
Sec. 642	6
Miscellaneous:	
Mechem Pub. Off., Secs. 1022, 1025	8
Russell on Crimes (7th Eng. Ed., 601)	8
Wharton's Criminal Law (9th Ed.), Sec. 1568	8

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit. The decision of the District Court was not reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts in this case are set out in the certificate, pages 1 and 2, as follows:

> The first count of the information in this case charges that, " on or about the 2d day of September, 1922, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, in an automobile truck from those certain premises known and described as 'James McKay's Place,' situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the city of Reno, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley then and there having knowledge, as aforesaid, of the said violations of the

National Prohibition Act by the said James A. Curran, did wilfully, unlawfully, and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act."

The information contained three other counts of like import, but as to the latter the jury returned a verdict of not guilty. A verdict of guilty was returned as to the first count only and the judgment on the verdict is now before the above entitled court for review on writ of error.

THE QUESTION CERTIFIED

Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, agents, or inspectors to report violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the district in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II within the true intent and meaning of Section 29 of said Act and Title?

THE STATUTE INVOLVED

Section 2, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 308; U. S. C., Title 27, Sec 11), provides:

> The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States * * *.

Section 29 of the same Act and Title (U. S. C., Title 27, Sec. 46) provides:

> Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

ARGUMENT

CONSTRUCTION OF THE STATUTE

We quote the following from an unreported memorandum opinion by the trial court in this case:

> We have here a public statute imposing a duty on certain officers, and the same statute in a subsequent section, prescribing a penalty for willful failure to perform the duty. It is impossible to construe the statute otherwise. Similar statutes have been upheld and enforced. *State* v. *Gluck,* 49 Kans. 533; *Bledsoe* v. *State,* 130 Ark. 122; *State* v. *Darling,* 89 Maine, 400; *State* v. *Williams,* 109 Ark. 465.

Though the statutes referred to are directed to the same purpose as the charge in this case, their structure is not so similar that the cases cited may afford much aid in the interpretation of the sections of the National Prohibition Act here involved. Thus *State* v. *Gluck* is based upon a statute clearly defining a crime for an officer's failure to report a violation of the law. *Bledsoe* v. *State* and *State* v. *Williams* are apparently based upon Section 11, c. 40, of the Revised Statutes of Arkansas. This section specifically penalizes a sheriff who fails or refuses to perform duties required of him by law. *State* v. *Darling* does not involve the construction of the statute upon which the indictment was based.

There is precedent in previous Acts of Congress for penalizing the failure of certain officers to report a violation of specific laws. Those affected by this character of legislation are: Revenue officers, customs officers, officers of the Alaska Game Commission, guides authorized by the Alaska game laws and certain officers of the District of Columbia.

Thus the first legislation of this character by Congress is the Act of July 18, 1866 (c. 201, 14 Stat. 178, 179, 188). Section 7 required Collectors of Customs to report violations of the Revenue laws to the United States Attorney within 10 days, and Section 42 imposed a penalty for failure. The Act of March 3, 1873 (c. 244, 17 Stat. 580), amended Section 7 to include Collectors of Internal Revenue and it was subsequently carried into the Revised Statutes as Sections 3164 and 3084.

With but slight amendment, Section 3164 has been successively continued in force by Section 1317 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1146), Section 1311 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 311), Section 1018 of the Revenue Act of 1924 (c 234, 43 Stat. 253, 344) and Section 1115 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 117). (See Appendix, p. 15.)

Section 3084, Revised Statutes, was repealed by Section 642 of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 989), but substantially reenacted by Section 603 of the same Act (p. 984). (See Appendix, p. 15.

Section 42 of the Act of July 18, 1866 (c. 201, 14 Stat. 178, 188), was enlarged and carried into the Revised Statutes as Section 1780. It is now Section 101 of the Penal Code (U. S. C., Title 18, Sec. 188), which provides:

> Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of

> Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars.

In a like manner the Act of July 20, 1868 (Sec. 98, c. 186, 15 Stat. 125, 165), provided punishment for the failure of any revenue officer to report any violation of the Revenue laws, within his knowledge, to his superior. This became Section 3169 of the Revised Statutes, which in turn was extended to all persons coming under any Revenue or Customs law or the revenue provision of any law by Section 23 of the Act of February 8, 1875 (c. 36, 18 Stat. 307, 312). (See Appendix, p. 7.) See U. S. C., Title 26, Sec. 68.

For the neglect of duty by an employee concerned in the census (c. 2, Sec. 22, 36 Stat. 1, 8, reenacted in c. 97, Sec. 22, 40 Stat. 1291, 1299; U. S. C., Title 13, Sec. 44), for neglect of duty imposed by Alaska Game Commission Act (c. 75, Sec. 15, 43 Stat. 739, 747; U. S. C., Title 48, Sec. 202) and for failure of a guide to report a violation of the Alaska Game Law (c. 162, Sec. 5, 35 Stat. 102, 104), Congress had provided a penalty. And a precedent particularly applicable is found in the Prohibition Act for the District of Columbia punishing any officer who fails to report any information of a violation of that Act. (See appendix, p. 16.)

Moreover, neglect of duty has always been an indictable offense at common law. Russell on Crimes

64819—27——2

(7 Eng. Ed.), 601. And the authorities cited in the memorandum of the trial court disclose that the States have created the same offense by statute. See also *People* v. *Herlihy,* 72 N. Y. Supp. 389; Mechem Pub. Off., Sec. 1022, 1025; Wharton's Criminal Law (9th Ed.), Sec. 1568.

In providing machinery for its enforcement, the National Prohibition Act originally placed all responsibility upon the Commissioner of Internal Revenue. In adapting this machinery to that which theretofore existed in the Bureau of Internal Revenue, Section 28 provided that these new prohibition officers, operating under the Commissioner of Internal Revenue, should have the same power and protection in the enforcement of the Act which is conferred by existing laws upon internal revenue officers. It has already been shown that these officers were subject to punishment for failure to report violations of law within their knowledge. It may well have been that Congress intended to place these new prohibition officers under the liabilities theretofore imposed upon internal revenue officers as well as to provide them with the same power and protection.

Analysis of Title II also discloses that Congress intended that the Government should have all the information possibly available for administrative purposes. Accordingly, it was provided: In Section 7, that a physician should keep a record; in Section 12, that a manufacturer should attach labels

to the containers and packages; and in Section 13, that a carrier should keep a record of shipments. Unquestionably the penal provisions of Section 29 are intended to enforce a compliance with these requirements. Congress even provided a plan for securing information from the violators themselves, for Section 30 protects the Government against a plea of self-incrimination by a witness. Yet the witness is subject to punishment for contempt if he does not testify. In keeping with this general plan of procuring information for the Government, there would be no inconsistency in enforcing by a penal provision the requirement that the officer make the report required in Section 2.

In keeping also with this plan of procuring information, Congress took pains to insure that, when submitted, it should be correct. Section 29, therefore, penalized any person "who makes any false * * * report, * * * required by this title." Thus, if this provision is applicable to the acts of administrative officers, a penalty falls on the officer who, though returning the report, turns in false information. It is unlikely that Congress would permit total evasion of the requirements of Section 2 by returning no report whatever, since this would be equally as dangerous to proper administration of the Act as would be the filing of a false report.

If the language of Section 2—"shall investigate and report"—is construed as a mandate to do a particular thing, there is authority for interpreta-

tion of the words "offense" and "violates" in Section 29 which might indicate that Congress intended that an officer should be subject to prosecution for having failed to make a report to the United States Attorney. This Court has held that "an offense * * * is an act committed or omitted 'in violation of a public law, either forbidding or commanding it'." *United States* v. *Eaton,* 144 U. S. 677, 687. In *State* v. *Case,* 53 Mo. 246, the Supreme Court of Missouri held that a statute requiring an insurance company to file certain statements might be "violated" negatively by nonobservance.

On the other hand, there is precedent for the requiring of reports to be made to the United States Attorney, without providing a penalty for failure so to do, in the following: Seizure for violations of the Act prohibiting aliens from fishing in Alaskan waters (Section 4, Act of June 14, 1906, c. 3299, 34 Stat. 263, 264; U. S. C., Title 48, Sec. 246); violations of the Safety of Employees Act (Sec. 3, Act of May 30, 1908, c. 225, 35 Stat. 476; U. S. C., Title 45, Sec. 18); violations of the Safety Appliance Act (Sec. 6, Act of March 2, 1893, c. 196, 27 Stat. 531, 532, as amended by the Act of April 1, 1896, c. 87, 29 Stat. 85; U. S. C., Title 45, Sec. 6); violations of the Insecticide Act (Sec. 4, Act of April 26, 1910, c. 191, 36 Stat. 331, 332; U. S. C., Title 7, Sec. 128); and violations of the Locomotive Boiler Safety Appliance Act (Sec. 9, Act of February 17, 1911, c. 103, 36 Stat. 913, 916; U. S. C., Title 45, Sec. 34). And

a diligent search has failed to reveal any such legislation applicable to a large class of Federal officers who carry a great burden in the detection of crimes against the United States—to wit, post-office inspectors, secret service operatives, immigration inspectors, and special agents of the Department of Justice.

Applying the penal provisions of Section 29 to the failure to discharge the duty imposed upon the administrative officers under Section 2 would require the application of the same penalties to the failure to comply with the following other duties imposed under Title II.

Section 5. If the commissioner has reason to believe an article does not correspond with the description, he shall give notice to the manufacturer, etc.

Section 8. The commissioner shall furnish blank prescriptions.

Section 9. The commissioner, if he has reason to believe an offense has been committed, shall issue citations, hold hearings, and forfeit permits.

Section 10. The commissioner ~~shall~~ may prescribe the form of records.

Section 26. Officers shall seize liquor transported.

Officers shall arrest person in charge.

Officers shall proceed against such person in court.

Section 29. District Attorney ~~shall~~ ascertain and plead previous conviction.

If Section 29 was intended to cover dereliction in all of these duties, it is unlike previous legislation by Congress upon similar matters. Heretofore, when Congress made penal the neglect of duty by a Government officer, it plainly provided in the statute that the penalty applied to officers.

Then, too, there is reason to believe that Section 29, as a whole, is not quite appropriate to penalize the neglect by officers of the United States of all the duties imposed upon them by Title II. The first provision, "any person violating the provisions of any permit," clearly relates to others than public officials. The second part, "who makes any false record, report, or affidavit," likewise seems to apply to others than public officials. Considering the third clause, relating to those who violate "any of the provisions of this title," in the light of the restricted applicability of the first and second clauses, it does not seem likely that Congress, by using general terms, intended to include within their scope the conduct of public officials in the administration of this law. Furthermore, the penal clauses provide for first, second, and subsequent offenses with no distinction as to the class of offenders. Congress likely did not assume that a public official who had been tried and convicted for failure to perform his duty would be allowed to remain in the service with an opportunity to commit a second or subsequent offense.

The context of Section 2 indicates that there is no substantial difference in meaning between the provision requiring that "the commissioner * * * shall investigate and report violations" and the provision that the United States Attorney "is hereby charged with the duty of prosecuting the offenders." It seems that the first phrase is equivalent to the statement that the commissioner and his assistants are charged with the duty of investigating and reporting violations. This is the only meaning that can be ascribed to the same language when used in Section 2, Title I. (41 Stat. 306.)

All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers, intended to prescribe the procedure to be followed. We think that Section 2 was intended to prescribe the administrative course to be followed and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers to perform any one of the innumerable duties imposed upon them by Title II.

It is a well-established rule that offenses should be created only in language that need not deceive the common mind, so that every man might be able to know with certainty when he is committing a crime. *United States* v. *Reese,* 92 U. S. 214, 220. Any doubt in that respect must be resolved in favor of the accused.

CONCLUSION

The Government is inclined to the view that the question should be answered in the negative.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
NORMAN J. MORRISSON,
Senior Attorney.

SEPTEMBER, 1927.

Appendix

Section 1115 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 117; U. S. C., App., Title 26, Sec. 26), provides:

> It shall be the duty of every collector of internal revenue having knowledge of any willful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the district attorney of the district in which any fine, penalty, or forfeiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of law believed to be so violated on which reliance may be had for condemnation or conviction.

Section 603 of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 984; U. S. C., Title 19, Sec. 510) provides:

> It shall be the duty of the collector whenever a seizure of merchandise has been made for a violation of the customs laws to report the same to the Solicitor of the Treasury, and promptly also to report any such seizure or violation of the customs laws to the United States Attorney for the district in which such violation has occurred, or in which such seizure was made, including in such report a statement of all the facts and

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement of the case	4
Summary of argument	9
Argument:	
I. Construction of the statute	10
II. Claimed errors relating to the court's charge	18
III. The sufficiency of the evidence	24

AUTHORITIES CITED

Cases:	
Bledsoe v. *State*, 130 Ark. 122	12
Burton v. *United States*, 202 U. S. 344	24
Crumpton v. *United States*, 138 U. S. 361	24
Lampasas v. *Bell*, 180 U. S. 276	18
Pettibone v. *United States*, 148 U. S. 197	11
State v. *Darling*, 89 Maine 400	12
State v. *Gluck*, 49 Kans. 533	12
State v. *Williams*, 109 Ark. 465	12
United States v. *Reese*, 92 U. S. 214	11
Statutes:	
Act of July 18, 1866 (c. 201, 14 Stat. 178), section 42	13
Act of July 20, 1868 (c. 186, 15 Stat. 125), section 98	13
Act of February 8, 1875 (c. 36, 18 Stat. 307; U. S. C., title 26, section 68), section 23	14
Act of June 14, 1906 (c. 3299, 34 Stat. 263; U. S. C., title 48, section 246), section 4	14
Act of July 2, 1909 (c. 2, 36 Stat. 1), section 22	14
Act of March 3, 1919 (c. 97, 40 Stat. 1291; U. S. C., title 13, section 44), section 22	14
Alaska Game Commission act (c. 75, 43 Stat. 739; U. S. C., title 48, section 202), section 15	14
Alaska game law (c. 162, 35 Stat. 102; U. S. C., title 48, section 202), section 5	14
Criminal Code, section 101 (U. S. C., title 18, section 188)	13
Insecticide act (act of April 26, 1910, c. 191, 36 Stat. 331; U. S. C., title 7, section 128), section 4	15

72821—27——1

Statutes—Continued. Page

Locomotive boiler safety appliance act (act of February 17, 1911, c. 103, 36 Stat. 913; U. S. C., title 45, section 34), section 9 15

National prohibition act (act of October 28, 1919, c. 85, 41 Stat. 305), Title II—

Section 2 (U. S. C., title 27, section 11) 3

Section 29 (U. S. C., title 27, section 46) 4

Section 33 (U. S. C., title 27, section 50) 23

Prohibition act of the District of Columbia (c. 165, 39 Stat. 1123), section 21 14

Revised Statutes—

Section 1780 (U. S. C., title 18, section 188) 13

Section 3169 (U. S. C., title 26, section 64) 13

Safety appliance act (act of March 2, 1893, c. 196, 27 Stat. 531), section 6, as amended by act of April 1, 1896 (c. 87, 29 Stat. 85; U. S. C., title 45, section 6) 14

Safety of employees act (act of May 30, 1908, c. 225, 35 Stat. 476; U. S. C., title 45, section 18), section 3 14

Textbook:

Throop, Public Officers, section 855 11

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either court below.

JURISDICTION

Upon the certification to it by the Circuit Court of Appeals of a question of law arising in this case, this Court ordered the entire record sent up for its consideration and the decision of the whole matter in controversy, pursuant to the jurisdiction conferred by Section 239 of the Judicial Code. as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Under Section 239, *supra,* the case is in this Court with like effect as though brought up on writ of error. As no decision was rendered by the Circuit Court of Appeals, the questions to be decided by this Court are those presented by the assignments of error upon which the case was taken to the Circuit Court of Appeals. The first of these questions is that certified by the Circuit Court of Appeals, as follows:

> 1. Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, agents or inspectors to report violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the district in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II, within the true intent and meaning of Section 29 of said Act and Title?

If the foregoing question is decided in the affirmative the case presents the following other questions:

> 2. Does Section 2 require a report to the United States Attorney where the investigating officer acquires knowledge of a violation of the National Prohibition Act but not of the person or persons who committed such violation?
>
> 3. Does Section 2 require such a report where in the judgment of the investigating officer the evidence in his possession tending

to show a violation and by whom committed is insufficient to justify a prosecution?

4. Where it is charged in a criminal information that the defendant, in violation of Section 2, Title II, of the National Prohibition Act, willfully failed to report a violation of that Act, alleged to have been committed at a specified time and place by one Curran, is it essential to a conviction of the defendant that the jury find that Curran actually did commit the offense alleged?

5. Was the evidence sufficient to warrant submission of the case to the jury?

STATUTES INVOLVED

Sections 2 and 29, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 308, 316; U. S. C., Title 27, Sections 11 and 46), provide as follows:

> SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to

the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. * * *

SEC. 29. * * *

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. * * *

STATEMENT OF THE CASE

On January 16, 1925, there was filed in the District Court of the United States for the District of Nevada a criminal information in four counts charging John P. Donnelley with various offenses against Section 2, Title II, of the National Prohibition Act. (R. 1–7.) The first count alleged that the defendant—

> * * * on or about the 2d day of September, 1922, * * * then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, * * * and then and there knowing of and having actual knowledge of vio-

> lations of the National Prohibition Act by one James A. Curran in the willful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, * * * did willfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

The second, third, and fourth counts charged similar failures on the part of the defendant, as such Federal Prohibition Director, to report or to investigate violations of the National Prohibition Act subsequently coming to his knowledge. As there was an acquittal on all but the first count, the allegations of the subsequent counts need not be further noticed.

In so far as it related to the charge contained in the first count, the evidence at the trial was as follows: At all times alleged in the information the defendant was Federal Prohibition Director for the State of Nevada. On the morning of September 2, 1922, some one in the defendant's office received a telephone message that a truck had broken down on

the main highway about two miles from Reno and that in the informant's belief the truck contained a load of liquor. The defendant immediately sent five prohibition agents to investigate. These agents found one James A. Curran, a public drayman, at the place designated, engaged in making repairs to a truck upon which there were ten barrels with no marks thereon indicating their contents. Curran told the agents that he knew nothing of the contents of the barrels; that, responding to a telephone call, he had received the load from another disabled truck, the driver of which he did not know, but who requested him to haul the load to his (Curran's) warehouse, where the driver of the disabled truck would call for it. (R. 19–20.)

One of the officers broke in the head of one of the barrels and removed three bottles having no labels or marks on them. One of these bottles was opened and its contents tasted by several of the officers who recognized the taste as that of beer containing more than one-half of one per cent of alcohol. The other two bottles were taken to Reno and analyzed by a chemist, who found their contents to consist of beer having an alcoholic content in excess of four per cent. After Curran's truck was repaired it was driven by him, in the company of two of the officers, to the city hall at Reno, where, following a report from the chemist as to the character of the beer, the ten barrels were taken from the truck and placed in a Government vault. Shortly after the arrival of the truck at the city

hall the defendant appeared, and after a talk with Curran and several of the officers gave directions permitting Curran to depart with his truck. In reply to an inquiry by Officer Nash, who had taken part in the seizure, whether Curran had been released, the defendant said that he had, because there was no case against him and that Curran had told the defendant that he did not know what was in the barrels. (R. 21.) The defendant was asked by Officer Dubois at the city hall what he intended to do with regard to the case, and answered that he would let Curran go with his truck; that they could get him at any time; and that he, the defendant, would take up the matter with the United States Attorney. (R. 22.) No director's case report or other written report was made by the defendant to the United States Attorney regarding the Curran beer seizure, nor was any mention made of that seizure in the director's monthly report for September, 1922, to the Commissioner of Prohibition at Washington. The beer was destroyed pursuant to an order of the court made March 5, 1923, reciting, "No case—ten barrels of beer." The United States Attorney, called as a witness for the Government, testified that the defendant had made no report to him, oral or written, respecting the Curran matter and beer seizure, and that the witness did not see any newspaper account of such seizure. (R. 23–24.)

Taking the stand in his own behalf the defendant testified that on the day of the seizure and prior

to the release of Curran he went to the office of the United States Attorney and informed him of the seizure, and that the United States Attorney agreed with the witness that Curran should be released; that the witness had made no director's case report to the United States Attorney because "We didn't have a case; if we got evidence that Mr. Curran did know, why, we would complete our case and make a report;" that it was his custom not to make a report where, in his judgment, there was not sufficient evidence, the case being considered under investigation until it was built up and completed; and that during his term as Director the witness had submitted to the United States Attorney approximately 500 case reports. (R. 24.) The Government thereupon introduced in evidence four director's case reports made by the defendant to the United States Attorney, as showing instances in which the defendant had made such a report, although the identity of the person committing the offense was unknown, or the evidence insufficient to justify a prosecution. (R. 24–25.)

A motion by the defendant for a directed verdict at the close of the Government's case, as well as a like motion at the conclusion of all the testimony, was denied. (R. 31–32.) The jury returned a verdict of guilty on the first count, and the defendant moved, in arrest of judgment, that the court had no jurisdiction to enter the judgment and that the information failed to charge an offense. (R. 46.) The motion was overruled, as was also a

motion for a new trial, setting up that the court had misdirected the jury, that it had erred in its decision of questions of law arising in the course of the trial, and that the verdict was contrary to law and to the evidence. The court thereupon sentenced the defendant to pay a fine of $500 and to be confined in the county jail until the fine was paid. (R. 47.)

The defendant took the case to the Circuit Court of Appeals upon fifteen assignments of error (R. 11–19), which are relied upon in his brief filed in that court as grounds for the following contentions (Br. 8–9):

> (*a*) That the count of the information upon which the defendant was adjudged guilty fails to state an offense. (Assignment No. 3; R. 11, 46, 47.)
>
> (*b*) That the jury was misdirected in matters of law. (Assignments Nos. 7, 8, 9, 10, 12, 14, 15; R. 12–19, 45, 46.)
>
> (*c*) That the evidence was insufficient to support the verdict and judgment. (Assignments Nos. 1, 2, 4, 5, 6; R. 11, 12, 45, 46.)

SUMMARY OF ARGUMENT

The provision in Section 29 that any person who violates any provision of Title II of the National Prohibition Act shall be guilty of a criminal offense does not seem to have been intended to punish administrative officers and United States Attorneys for failure to perform the numerous duties imposed on them by the Act. While the question is one on

which opinions may differ, the better reason supports the view that it was not intended by Section 29 to punish as a crime the failure of an administrative officer to report to the United States Attorney a case justifying prosecution.

If the statute is construed to make that an offense, then it was error for the trial court to refuse to charge the jury that a violation of the Act did not occur unless the official had evidence sufficient to reasonably warrant prosecution.

The other charges refused or given and complained of do not disclose prejudicial error.

If the statute covers the case, the evidence was sufficient to go to the jury on the question whether the plaintiff in error had in bad faith neglected to report for prosecution a case where he had sufficient evidence to warrant prosecution.

ARGUMENT

I

THE CONSTRUCTION OF THE STATUTE

There can be no doubt that the provision in Section 2, to the effect that "The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney," makes it the duty of those officers to investigate, and if a case is disclosed which appears to warrant prosecution to report it to the United States attorney. The question is whether Congress intended to define

and punish as a crime a breach of these duties, as well as of all the others imposed by this statute on administrative officers, when it provided in Section 29 that "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed," shall be subject to criminal prosecution.

At common law it is a public offense, punishable as a misdemeanor, for an administrative or executive officer to refuse or wilfully and knowingly to fail to carry out a duty imposed upon him as such officer by law. Throop, Public Officers, Section 855. There are no common law offenses against the United States (*Pettibone* v. *United States,* 148 U. S. 197, 203), and in order that an act or omission may be held to constitute an offense it must be so declared by Act of Congress "in language that need not deceive the common mind," for "Every man should be able to know with certainty when he is committing a crime" (*United States* v. *Reese,* 92 U. S. 214, 220). In the instant case the District Court treated the failure to report as constituting an offense thus clearly defined by Section 29. In an unreported memorandum opinion rendered upon a demurrer to an indictment based upon the same facts and charging in one of its counts the same offense as that set out in the first count of the present information, the court below said:

> We have here a public statute imposing a duty on certain officers, and the same statute in a subsequent section, prescribing a penalty for wilful failure to perform the duty. It is impossible to construe the statute otherwise. Similar statutes have been upheld and enforced. *State* v. *Gluck,* 31 Pac. 690 (49 Kans. 533); *Bledsoe* v. *State,* 130 Ark. 122; *State* v. *Darling,* 89 Maine, 400; *State* v. *Williams,* 109 Ark. 465.

The cases here cited do not appear to support the point for which they were invoked. *State* v. *Gluck* was a prosecution of a mayor under a statute declaring it to be the duty of certain officers, including mayors, to notify the county attorney of any violations of the Act of which they had notice or knowledge, it being provided in the same section that " if any such officer shall fail to comply with the provisions of this section" he shall be fined. *Bledsoe* v. *State* and *State* v. *Williams* involved prosecutions apparently based upon Section 11, c. 140, of the Revised Statutes of Arkansas, which specifically penalizes a sheriff who fails or refuses to perform duties required of him by law. In *State* v. *Darling* a complaint against a fish and game warden for neglecting to arrest certain violators of the state fishing law was dismissed as an insufficient pleading. No construction of the statute upon which the complaint was based was involved.

Plaintiff in error's claim in the present case is not that Congress lacks power to make a failure of duty on the part of a Federal administrative offi-

cer an offense, but that it has not done so with reference to the duty to investigate and report imposed by Section 2. Statutes by Congress expressly making it an offense for specified officers to neglect or fail in the performance of certain duties have been in force for many years. Thus, Section 42 of the Act of July 18, 1866 (c. 201, 14 Stat. 178, 188), provided a penalty for the failure of "any collector of the customs, supervising or local inspector of steamboats, or other officer," to "neglect or refuse to make any of the returns or reports which he is required to make at stated times by any Act of Congress or regulation of the Treasury Department," etc. This section was carried into the Revised Statutes as Section 1780 and later into the Criminal Code as Section 101 (U. S. C., Title 18, Section 188), which reads:

> Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars.

In like manner Section 98 of the Act of July 20, 1868 (c. 186, 15 Stat. 125, 165), provided punishment for the failure of any revenue officer to report any violation of the revenue laws, within his knowledge, to his superior. This became Section 3169 of the Revised Statutes, which in turn was extended

to all persons coming under any revenue or customs law or the revenue provision of any law by Section 23 of the Act of February 8, 1875 (c. 36, 18 Stat. 307, 312; U. S. C., Title 26, Section 68).

For neglect of duty by an employee concerned in the census (c. 2, Section 22, 36 Stat. 1, 8; c. 97, Section 22, 40 Stat. 1291, 1299; U. S. C., Title 13, Section 44); for neglect of duty imposed by the Alaska Game Commission Act (c. 75, Section 15, 43 Stat. 739, 747; U. S. C., Title 48, Section 202), and for failure of a guide to report a violation of the Alaska Game Law (c. 162, Section 5, 35 Stat. 102, 104; U. S. C., Title 48, Section 202), Congress provided a specific penalty, as it did also by Section 21 of the Prohibition Act of the District of Columbia (c. 165, 39 Stat. 1123, 1129) in the case of any officer who failed to make the reports required of him by that section.

On the other hand, Congress has in the following statutes required a report of law violations to be made to the United States Attorney without providing a penalty for the failure to perform that duty: Seizure for violations of the Act prohibiting aliens from fishing in Alaskan waters (Section 4, Act of June 14, 1906, c. 3299, 34 Stat. 263, 264; U. S. C., Title 48, Section 246); violations of the Safety of Employees Act (Section 3, Act of May 30, 1908, c. 225, 35 Stat. 476; U. S. C., Title 45, Section 18); violations of the Safety Appliance Act (Section 6, Act of March 2, 1893, c. 196, 27 Stat. 531, 532, as amended by the Act of April 1, 1896, c. 87,

29 Stat. 85; U. S. C., Title 45, Section 6); violations of the Insecticide Act (Section 4, Act of April 26, 1910, c. 191, 36 Stat. 331, 332; U. S. C., Title 7, Section 128); and violations of the Locomotive Boiler Safety Appliance Act (Section 9, Act of February 17, 1911, c. 103, 36 Stat. 913, 916; U. S. C., Title 45, Section 34). And, so far as diligent search has revealed, no such penalties have been provided as to a large class of Federal officers engaged in the detection of crimes against the United States—to wit, post-office inspectors, secret-service operatives, and special agents of the Department of Justice.

Because of the legislation referred to it would seem that whenever Congress has intended to make a neglect of duty by a Federal officer punishable as an offense it has so provided in plain terms, designating the offender by the title of his office, or referring to him as "such officer," or by other unmistakable description.

To construe the penal provisions of Section 29 to apply to the failure to investigate and report requried by Section 2 would necessitate the application of the same penalties to the failure to perform the following other official duties imposed by Title II:

Section 5. If the commissioner has reason to believe an article does not correspond with the description, he shall give notice to the manufacturer, etc.

+ This notice is only to be given if when analysis shows that the permitted article does not correspond with the

refusal of the officer to give notice + himself might reasonably be punished as an offense

Section 8. The commissioner shall cause to be printed and shall furnish blank prescriptions.

Section 9. The commissioner, if he has reason to believe an offense has been committed, shall issue citations, hold hearings, and forfeit permits.

Section 10. The commissioner shall prescribe the form of records.

Section 26. Officers shall seize liquor transported. Officers shall arrest person in charge. Officer shall proceed against such person in court.

Section 29. District Attorney shall ascertain and plead previous conviction.

If Section 29 was intended to cover dereliction in all these duties, it is unlike previous legislation by Congress upon similar matters, for, as hereinbefore shown, whenever Congress has made penal a neglect of duty by a Government officer it has done so by specific provision.

There is further reason to doubt the intention by Section 29, taken as a whole, to penalize the neglect by officers of the United States of all the duties imposed upon them by Title II. The first provision, "Any person violating the provisions of any permit," clearly relates to others than public officials. The second part, "who makes any false record, report, or affidavit," likewise seems to apply to others than public officials. Considering the third clause, relating to those who violate "any of the provisions of this title," in the light of the restricted applicability of the first and second clauses, it does not seem likely that Congress, by using gen-

eral terms, intended to include within their scope the conduct of public officials in the administration of this law. Moreover, the penal clauses provide for first, second, and subsequent offenses, with no distinction as to the class of offenders, and it can hardly be assumed that Congress believed that a public official who had been tried and convicted for failure to perform his duty would be allowed to remain in the service with an opportunity to commit a second or subsequent offense.

All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers intended to prescribe the procedure to be followed. We think that Section 2 was similarly intended to prescribe an administrative course to be followed, and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers or United States attorneys to perform any one of the innumerable duties imposed upon them by Title II.

If the statute is properly to be construed, as above indicated, the information in this case failed to state an offense against the United States and the conviction of the plaintiff in error was erroneous. Entertaining this view of the meaning of the statute, we nevertheless deem it advisable to submit the case for the decision of this Court. The point is not so clear as to justify a different course. If

the Court regards the statute as defining the offense charged in the information, it will then be necessary to consider the remaining points relied upon by the plaintiff in error.

II

CLAIMED ERRORS RELATING TO THE COURT'S CHARGE

At the close of the testimony the defendant requested the court to give certain instructions to the jury. Instructions Nos. 1 to 4, inclusive, and 7 and 8, thus requested, were refused and an exception noted. (R. 32–34, 45–46.)

Nos. 7 and 8 (R. 14) would have advised the jury that a Federal prohibition agent can not lawfully make an arrest except for an offense committed in his presence, and that a Federal prohibition agent can not lawfully search a vehicle upon a public highway without a search warrant unless such officer has probable cause for belief that the vehicle is carrying contraband or illegal merchandise. These requested instructions had reference to the arrest of Curran and the search of his truck. Curran was not on trial and the defendant, Donnelley, could not complain of an alleged invasion of the constitutional rights of another. *Lampasas* v. *Bell,* 180 U. S. 276, 283–284. Such a charge, while correct as an abstract statement of law, would only have been justified on the theory that if the search and seizure were unlawful, the evidence obtained by it would have been inadmissible and that Donnelley,

therefore, had a right to conclude he had no case against Curran. There is nothing in this record to show that the search was without probable cause, and the requests were properly denied.

By requested Instruction 1 (R. 12) the jury would have been told that reports were required only when the identity of the offender was "known" to the Prohibition Director. This was too broad. Definite knowledge of identity would not be necessary. Besides, there was no question as to the identity of Curran as the truck driver.

Request 2 (R. 12) was as follows:

> That the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense.

This request also related to the identity of the offender. Count 1 of the information in this case charged a failure to report a case against Curran alone. His identity as the driver of the truck was known. The only question was whether Donnelly had evidence of Curran's guilt. The request No. 2, while correct as an abstract statement, was inapplicable to this case.

Request No. 3 (R. 13) asked the court to instruct the jury "that the knowledge upon his part making it obligatory for him to so report consists of suf-

ficent evidence in his possession to reasonably justify prosecution," and that this related both to the fact that an offense had been committed and to the identity of the offender. This request was proper, and we know of no good reason why it or the substance of it was not given.

The request to give this instruction was based upon the provision of the statute, "shall investigate and report violations of this Act to the United States attorney * * * who is hereby charged with the duty of prosecuting the offenders." This language indicates the purpose of Congress that only such violations were to be reported to the United States Attorney as would enable that officer to prosecute the offenders. The United States Attorney is not an evidence-gathering officer, nor has he any supervisory authority over the manner in which the officers charged with administering the Act and of discovering violations of its provisions may perform their duties. He is purely a prosecuting officer, and to report to him an alleged violation without sufficient evidence on which to base a prosecution would give him nothing upon which to act.

Furthermore, the duty imposed by Section 2 is not only to report but to "investigate and report," and if the purpose of the report is to furnish the United States Attorney with grounds upon which to prosecute the offender, it would seem, in the absence of any provision in the statute fixing the

time when such report shall be made, that it is for the investigating officer to determine, in the exercise of good faith, at what point in the investigation the evidence secured by him is sufficient to warrant a prosecution and accordingly to justify his reporting the matter to the United States Attorney.

The court construed the statute as requiring a report to the United States Attorney whenever knowledge of a violation was acquired by the commissioner or any of his subordinates enumerated therein, regardless of the character of the evidence.

The defendant's fourth requested instruction, refused by the court, was to the effect that unless the jury believed beyond a reasonable doubt that Curran was knowingly in possession of and transporting intoxicating liquor, their verdict should be for the defendant on the first count, for it is not a violation of the National Prohibition Act to possess and transport intoxicating liquor without knowing that it is intoxicating liquor.

With reference to whether Curran had committed a violation of the Act, the court in its charge said (R. 38–39):

> It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. * * *
>
> In this case if Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he can not be convicted,

> nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway.

Exception was taken by the defendant both to the refusal to charge and to the foregoing charge of the court. (R. 45–46.)

The requested instruction was correctly denied. It was based upon the theory that there could be no failure to perform the duty to report "violations" of the Act, imposed by Section 2, until the officer had evidence beyond a reasonable doubt that the act or omission which he failed to report did constitute such a violation. Surely such reports are not to be withheld by the Director until he has obtained evidence of guilt beyond a reasonable doubt.

The charge actually given by the court was, in effect, that the jury might find that there had been a violation which the defendant was required to report, notwithstanding that they might determine that such violation had not been committed by Curran. But, as shown by the information, the charge upon which the defendant was tried was not merely that he had failed to report a violation, but that he had failed to report a violation *committed by Curran* at a specified time and place. As these allegations were undoubtedly essential to apprise the defendant of the accusation against him, the instruction that the jury might convict, although find-

ing that Curran had not committed the violation alleged, appears to have been erroneous.

The final exception taken by plaintiff in error to the court's charge was to that part of it dealing with the effect of Section 33, Title II, of the National Prohibition Act, which declares that the possession of intoxicating liquor by anyone not permitted under Title II to possess it shall be prima facie evidence that such possession was for an unlawful purpose and that "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used." Referring to this statute, the court said (R. 38):

> So if one is in the possession of intoxicating liquor—and one who is transporting liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary.

This had relation to whether Donnelley had reason to believe the evidence in his possession showed a violation of the Act by Curran. In deciding whether Donnelley had failed to report a case where he had sufficient evidence to warrant prosecution the jury could properly consider that the mere possession of liquor by Curran created a statutory presumption of guilt, and thus strengthened the case against him. This charge was proper.

III

THE SUFFICIENCY OF THE EVIDENCE

Plaintiff in error complains that the evidence in this case is wholly insufficient to sustain the verdict. In support of that contention he has set out in his brief a résumé of the testimony introduced by the Government as well as by the defendant, in the apparent belief that it is a proper function of an appellate court to weigh conflicting testimony and determine therefrom whether the jury were justified in finding the defendant guilty beyond a reasonable doubt. But the rule is well established that in a criminal case the question whether the verdict was contrary to the evidence can not be considered on writ of error if there was any proper evidence to go to the jury. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Burton* v. *United States,* 202 U. S. 344, 374.

The Government's evidence showed that Curran was found in possession of a quantity of beer containing more than one-half of one per cent alcohol by volume; that this was brought to the attention of the defendant, as Federal Prohibition Director, and that, although in possession of such knowledge, the defendant failed to report the matter to the United States Attorney. The possession by Curran raised a presumption of guilt against him. There was evidence from which the jury could find that Donnelley had failed to report for prosecution

a case against Curran, in which the available evidence justified a prosecution of Curran.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

NOVEMBER, 1927.

○